

IN THE DISTRICT COURT OF THURSTON COUNTY, NEBRASKA

KIMBERLY M. WALKER,)	Case No. 9681
)	
Plaintiff,)	
)	REPLY BRIEF
vs.)	
)	
GREG SPEARS, BARB CROOM,)	
JAMES PARKER, GARY A. LASLEY,)	
GREG PHILLIPS, FRANKLIN DICK,)	
FORREST "J.C." ALDRICH,)	
DORAN L. MORRIS, SR., IRENE)	
L. PARKER, CLIFFORD R. WOLFE,)	
JR., VINCE MERRICK, RUSSELL)	
BRADLEY, LOTA MATHRANI,)	
SHAWN PARKER, RICHARD)	
ZEIPHER, CORA JONES,)	
and DEFENDANTS DOE 1-20,)	
)	
Defendants.)	

STATEMENT OF THE CASE

On April 14, 1998, all Defendants except Vince Merrick, Russell Bradley, Richard Zeipher and Cora Jones, filed a "Special Demurrer" with the Court. References herein to "Defendants" shall refer only to those defendants filing the demurrer.

Defendants' written demurrer contains additional issues not raised before the Court on April 1st and therefore are not addressed in Plaintiff's Brief. Plaintiff has filed, or will be filing prior to May 6, 1998, an Amended Petition, and therefore this brief will not address Defendants' Arguments I-III as they will be moot. This Reply Brief responds to the distortion of the law in Defendants' Brief on the issue of subject matter jurisdiction.

ARGUMENT**I. THE OMAHA TRIBE OF NEBRASKA IS NOT A PARTY TO THIS LAWSUIT.**

In considering a demurrer, a court must assume that the facts pled, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference

from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Giese v. Stice*, 252 Neb. 913 (1997). No legal precedent allows a court to substitute parties through a demurrer.

Defendants argue that the references in the Petition to the "Omaha Tribe," "Omaha Tribal Law Enforcement," "Omaha Tribal Jail," "Macy, Nebraska," and "Bureau of Indian Affairs," should allow this Court to infer that Plaintiff's Petition should have been filed against the Omaha Tribe rather than the listed Defendants.¹

The Petition before the Court clearly lists some 15+ Defendants; the Omaha Tribe of Nebraska is not one of them.

Defendants' argument against this Court's subject matter jurisdiction is built on this improper substitution of defendants, and, furthermore, contains a faulty analysis of P.L. 280-related caselaw.

II. PUBLIC LAW 280 CONFERRED JURISDICTION OVER "CIVIL CAUSES OF ACTION BETWEEN INDIANS OR TO WHICH INDIANS ARE PARTIES" ARISING IN INDIAN COUNTRY IN NEBRASKA TO NEBRASKA STATE COURTS.

In 1953, the United States government ceded civil jurisdiction in certain listed states over causes of action between Indians or to which Indians are parties and which arise in Indian country through P.L. 280. 28 U.S.C.S. § 1360. Nebraska is one of those states. Civil jurisdiction in the unlisted or specifically excluded areas of Indian country remain with the federal government.

Subsequent caselaw determining issues of state civil jurisdiction over Indians must then be separated into two lines of cases: (1) P.L. 280 states; and (2) non-P.L. 280 states. P.L. 280 states are Alaska, California, Minnesota (with the exception of the

¹ A curious position in light of the fact that Defendants' counsel position would place potential liability on another client of his--the Omaha Tribe of Nebraska. (Mr. Johnson's Entry of Appearance dated February 10, 1998 indicates that he also represents the Tribe.)

Red Lake Reservation), Nebraska², Oregon (except the Warm Springs Reservation), and Wisconsin. *Id.* All other states, including Arizona, New Mexico, and Washington, are non-P.L. 280.

Interpretation of state jurisdiction in non-P.L. 280 states has followed in a line of cases commencing with *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (Ariz. 1959) [held that Arizona courts are not free to exercise jurisdiction over civil suit where cause of action arose on an Indian reservation].

Sigana v. Bailey, 164 N.W.2d 886 (Minn. 1969)--a tort case arising on the Red Lake Reservation in Minnesota (non P.L. 280)--discusses the distinction to be made between the two types of states.

Under *Williams*, it is clear that it is still the law that a state has no jurisdiction, civil or criminal, over Indians residing in an Indian reservation, absent a grant of such jurisdiction by the Federal government.

As has been shown above, Minnesota has been granted such jurisdiction under 28 U.S.C.A. § 1360 [P.L. 280], over Indians residing on all reservations within the state except the Red Lake Reservation. Here the law as stated in *Williams* prevails.

Id. at 891.

The bulk of Defendants' cited cases decide issues in non-P.L. 280 states: *Sigana v. Bailey*, 164 N.W.2d 886 (Minn. 1969)--Red Lake Reservation in Minnesota; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267 (1973)--New Mexico; *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164, 93 S.Ct. 1257 (1973)--Arizona; *Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 100 S.Ct. 2069 (1980)--Washington; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578 (1980)--Arizona; *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 103 S.Ct. 2378 (1983)--New Mexico.

Furthermore, four of these cases deal with issues of state taxation and contain neither holding nor dicta regarding a state

² The Winnebago Tribe, also located in Nebraska, has undergone some jurisdictional changes relating to P.L. 280 which are not discussed nor relevant here. Defendants' reliance on a Nebraska Attorney General Opinion from 1985 regarding retrocession of the Winnebago Reservation is therefore misplaced.

court's subject matter jurisdiction over civil disputes involving Indians.

The four P.L. 280 state cases cited by Defendants are not much more helpful. In *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562 (1962), the U.S. Supreme Court upheld Alaska's right to regulate the use of fish traps, including enforcement against Indians. In *Duluth Lumber v. Delta Dev. Inc.*, 281 N.W.2d 377 (Minn. 1979), the only P.L. 280 case cited involving subject matter jurisdiction, the Supreme Court of Minnesota held that a state court had jurisdiction over a contract dispute involving the Indian Housing Authority and furthermore held that the housing authority was not entitled to claim sovereign immunity from suit.

In *Rice v. Rehner*, 463 U.S. 713, 103 S.Ct. 3291 (1983) [California] the U.S. Supreme Court held that a federally licensed Indian trader on a California Indian reservation could be required to obtain a state liquor license.

In the fourth P.L. 280 case cited by Defendants, *Oneida Tribe of Indians v. State of Wisconsin*, 518 F.Supp. 712 (1981), the critical question before the federal district court was whether the challenged bingo regulations were civil-regulatory or criminal-prohibitory. The court found that they were civil-regulatory and therefore not enforceable by the state. In reaching that holding, the court reiterated the primary purpose of P.L. 280 by referring to *Bryan v. Itasca County*, 96 S.Ct. 2102, 2106 (1976):

The primary concern of Congress in passing Pub.L. 280 . . . was . . . the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement.

The *Bryan* case contains a lengthy discourse of the legislative history of P.L. 280 by the United States Supreme Court, concluding that "in short, the consistent and exclusive use of the terms 'civil causes of action,' 'aris[ing] on,' 'civil laws . . . of general application to private persons or private property,' and 'adjudicat[ion],' in both the Act and legislative history virtually compels our conclusion that the primary intent of § 4 [of P.L. 280] was to grant jurisdiction over private civil litigation involving reservation Indians in state court." *Id.* at 2109.

The issue before this Court is subject matter jurisdiction in a civil dispute between individuals in a P.L. 280 state. There is

no authority, even via Defendants' chain of inferences, supporting the demurrer for lack of subject matter jurisdiction.

CONCLUSION

The Petition before the Court alleges a civil dispute between residents of Thurston County, Nebraska. Even if the Court would consider any relationship of the alleged facts to the Omaha Indian Reservation, this Court still retains jurisdiction pursuant to P.L. 280. This Court has subject matter jurisdiction of this dispute.

DATED this 22nd day of April, 1998.

RESPECTFULLY SUBMITTED,

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